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Case No. 85 - ____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

1985 TERM

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STEVEN RICHARDS NORDGREN,
DOUGLAS YOAKAM, RAY DODGE,
and JOHN C. BOLSINGER,
PETITIONERS,
vs.
WILLIAM MILLIKEN, Director, Utah
Division of Corrections, S. L. DIBELL,
BARBARA R. BURNETT, REV. FRANCE A. DAVIS,
DR. JEAN B. WHITE, DR. BART WOLTHUIS, M.
H. FLORES, members Board of Corrections
of Utah, LARRY MORRIS, Warden
of the Utah State Prison,
and STATE OF UTAH,
RESPONDENTS.

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ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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# BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR PETITIONERS

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88 pp

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## QUESTIONS PRESENTED

(1) Is the provision of attorney assistance limited to the preparation and filing of initial pleadings, an adequate substitute for a law library to guarantee prison inmate access to the courts as required by Bounds v. Smith, 430 U.S. 817 (1977)?

(2) After a pro se complaint has been filed for an inmate, is the possibility of appointment of counsel under 28 U.S.C. §1915(d) an adequate substitute for a law library as required by Bounds v. Smith?

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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# BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THE PETITIONERS, STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER, by and through their counsel of record, BRIAN M. BARNARD and Utah Legal Clinic submit the following BRIEF in Support of their Petition for Writ of Certiorari.

## DECISIONS BELOW

The opinion of the United States Court of Appeals in this matter is reported at Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985). The decision of the United States District Court for the District of Utah, Central Division is unreported and is not published.

## JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit Nordgren v. Milliken, 762 F.2d 851 (10th Cir. 1985) was entered on May 20, 1985.

On June 6, 1985, Petitioners lodged with the Clerk of the United States Court of Appeals a Petition for Rehearing and a Suggestion for Rehearing En Banc. The timeliness of the Petition for Rehearing is in question. The mandate has not issued; no action has been taken by the Court of Appeals on the Petition for Rehearing.

Petitioners requested and were granted an extension of time in which to file this Petition for Writ of Certiorari. The Order granting that extension was signed by the Hon. Byron R. White on August 9, 1985 allowing an extension until September 17, 1985.

Jurisdiction in this Court to review the judgment of the Court of Appeals below is conferred by 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Article IV, Section 2 of the United States Constitution which provides in pertinent part:

> SECTION 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

and Amendment I to the Constitution of the United States which provides:

> AMENDMENT I: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably. to assemble, and to petition the government for a redress of grievances.

Article IV and Amendment I of the Constitution of the United States have been made applicable to the states by

Section 1 and 5 of Amendment XIV to the Constitution of the United States:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> SECTION 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

and enforced by Title 42, Section 1983, United States Code:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

## STATEMENT OF CASE

In October, 1980, Petitioners filed a civil rights action under 42 U.S.C. §1983 and 28 U.S.C. §1343(3) alleging that the failure of the Utah State Prison to provide a law library or an adequate substitute for a law library to inmates constituted a violation of Article IV, and Amendments I and XIV to the United States Constitution.

The United States District Court for the District of Utah granted a Summary Judgment in favor of the Respondents adopting a Report and Recommendation of the United States Magistrate. The United States Court of Appeals for the Tenth Circuit upheld that decision, finding that the right of Utah prison inmates to access to the Courts was protected and the Utah

alternative to a prison law library was adequate under Bounds v. Smith, 430 U.S. 817 (1977).

The opinion was filed by the Court of Appeals on May 20, 1985. On June 6, 1985 Petitioners lodged with the Court of Appeals a Petition for Rehearing and a Suggestion for Rehearing En Banc. There exists a question as to the timeliness of filing the Petition for Rehearing. However, the Court of Appeals has neither issued the mandate nor acted on the Petition for Rehearing and Suggestion for Rehearing En Banc.

## STATEMENT OF FACTS

This matter was presented to the Trial Court on motions for Summary Judgment. The Court of Appeals reviewed the Summary Judgment. Thus, there are no

factual findings in this matter. The facts before this Court are not in dispute. A brief recitation of the facts is set forth to explain the question presented in this petition.

The petitioners are indigent inmates at the Utah State Prison, Draper, Utah, unable to afford legal counsel and untrained in the law. (A. pp. 2-3) (Hereafter, all references to the opinion of the Court below will be cited to the Appendix to this Petition and designated A. ___).

The petitioners are involved in legal actions that they are attempting to prosecute or defend pro se (A. pp. 2-4). These actions include civil rights claims under 42 U.S.C. §1983, a petition for modification of a divorce decree, a tortious conversion action, and a paternity action initiated by the State of

Utah against petitioner Nordgren. (A. pp. 3-4).

Plaintiffs petitioned the trial courts on various occasions to appoint legal counsel to represent them after the initial filing stages; these courts refused to do so. (A. p. 4) The two legal aid organizations in Salt Lake County will not assist petitioners. (A. p. 4)

William Milliken was the Director of the Division of Corrections of the State of Utah; Larry Morris was the Warden of the Utah State Prison when this action was filed. These and all other named respondents were charged with the duty and responsibility of custody of the inmates at the Utah State Prison and for compliance with the decision in Bounds v. Smith, 430 U.S. 817 (1977).

The Utah State Prison lacks a law library to enable inmates, including petitioners, to represent themselves in legal actions. (A. p. 9)

In lieu of a law library, the State of Utah has elected to provide services of contract attorneys to assist inmates only in the preparation and filing of initial pro se pleadings. These services do not include any representation by counsel or any assistance after the filing of the initial pleadings. (A. pp. 6-7, 10)

The Utah Prison contract specifically precludes the contracting attorneys from using funds received under the contract to assist inmates beyond the initial pleadings. (A. p. 7) Moreover, pursuant to an opinion of the Ethics Committee of the Utah State Bar (Ethics Opinion No. 78-49,

July 28, 1978*), the contract attorneys are ethically precluded from assisting inmates beyond the terms of the contract. That opinion states:

> [T]he inmate is given no choice of attorneys in that initial consultation. Therefore, it would be inappropriate and unethical [under DR-2-104(A)] for the attorney to accept employment by an inmate other than pursuant to the terms of the contract with the state. This Committee finds, therefore, that the attorney may not accept employment by an inmate, nor may he represent an attorney [sic -- inmate] beyond the terms of the state contract.

Ethics Committee of the Utah State Bar (Ethics Opinion No. 78-49, July 28, 1978)

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* Ethics Opinion No. 78-49 was issued in response to a specific request to the Utah State Bar Ethics Committee to review the State contract for limited civil legal services which is the subject matter of this action.

## ARGUMENT IN SUPPORT OF GRANTING CERTIORARI

### A. The Decision Below Is In Conflict With The Rulings of Other Courts of Appeals.

The decision below is in conflict with decisions of the Courts of Appeals for the Eleventh Circuit and for the Fifth Circuit.

In Bonner v. Prichard City, 661 F.2d 1206, 1212 (11th Cir. 1981) the Court of Appeals for the Eleventh Circuit was concerned about protecting the right of an inmate to his "day in court" and not just the right to file one pleading with the court clerk. That case held that assistance in filing only initial pleadings was not sufficient under Bounds v. Smith, 430 U.S. 817 (1977). A "fair hearing" and a "day in court" mean more than filing a

complaint to be dismissed without an adversary hearing and presentation.

> Inmate access to the courts must be "adequate, effective and meaningful." Bounds v. Smith, supra. It is none of these if it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to court and litigants.

Bonner, 661 F.2d at 1212.

The Eleventh Circuit rejected appellees' suggestion that:

> there has been no denial of access because Bonner secured access to the court when he filed his complaint and the court thereafter and for appropriate reasons dismissed his complaint. They [appellees] consider that denial of access is limited to the preparation and presentation to the court of complaints and petitions, such as the right to legal assistance and to legal materials in preparing documents for filing, and is unrelated to disposition by the court of a matter that the prisoner has filed. . . But the line is not drawn precisely at the courthouse door as appellees would have it.

Id. at 1212.

The Court of Appeals for the Fifth Circuit, in a similar case, was concerned about protecting the access right of an inmate, including "post-filing needs." Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985) held that assistance in filing only initial pleadings was not sufficient under Bounds. The opinion stated:

> The inmates' ability to file is not dispositive of the access question, because the Court in Bounds explained that for access to be meaningful, post-filing needs, such as the research tools necessary to effectively rebut authorities cited by an adversary in responsive pleadings, should be met. Id. at 825-26, 97 S.Ct. at 1496-97. In short, this found right of access includes the ability to file a legally sufficient claim. Bonner v. City of Prichard, 661 F.2d 1206, 1212 (11th Cir. 1981)(en banc).

Id. at 623.

These two reported opinions are in direct conflict with the opinion of the Court of Appeals in the case at bar which held:

> We are mindful of the significant claim involved here and its central importance in the protection of all rights of prisoners. Nevertheless in light of the substantial effort already made by the State and the extent of the burden in requiring more, we are persuaded that we should not hold that the right of access to the courts requires more than the assistance of counsel through completion of the complaint for a federal habeas or civil rights action. Ward v. Kort, supra, slip op. at 11.

(A. pp. 18-19)

The opinions in Bonner and in Morrow are in direct conflict with the opinion by the Court of Appeals herein. This petition for a writ of certiorari should be granted and the conflict resolved by this Court.

## B. Conflicting Interpretations of Decisions of This Court

The Court of Appeals opinion herein affirmed a decision that the provision of attorney assistance to indigent Utah State

Prison inmates limited to the preparation and filing of initial pleadings in civil rights actions and federal habeas corpus actions, with no attorney assistance and no law library available beyond that stage, was in compliance with the decision in Bounds v. Smith, 430 U.S. 817 (1977).

That opinion abrogates the remedial relief granted in Bounds; rather than preserving the inmate access right, as Bounds dictated, that opinion will encourage improper restrictions and a denial of the access right by prison officials.

Bounds set an absolute standard for inmates' access right by requiring that prison officials provide an adequate law library or an adequate substitute for a law library. Bounds did not hold that prison officials could provide law library use only to prepare initial pleadings and then deny library use for the balance of

the litigation. Such an interpretation, invited by the Court of Appeals below, directly violates the remedial intent of Bounds and Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970); aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam).

This Court has long held that prison inmates have a fundamental constitutional right to meaningful access to the courts. Ex parte Hull, 312 U.S. 546 (1941). Existence of the right was reaffirmed in Bounds v. Smith, 430 U.S. 817 (1977). The constitutional bases of the access right have been found in "the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment," Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907), "in the first amendment," California Motor Transport Co. v. Trucking Unlimited, 404 U.S.

508, 510 (1972), and "in the due process clause." Wolff v. McDonnell, 418 U.S. 539, 579 (1974); Johnson v. Avery, 393 U.S. 483 (1969).

This Court has defined the scope and content of the access rights. Initially invalidated were restrictions that, literally, denied prisoners the physical right to file legal papers in a court. See, e.g., Ex parte Hull, 312 U.S. 546 (1941); Griffin v. Illinois, 351 U.S. 12, 20 (1956); Smith v. Bennett, 365 U.S. 708 (1961).

This Court then invalidated a prison regulation prohibiting "jailhouse lawyers" from helping other inmates file habeas corpus petitions as an unconstitutional infringement upon the access right. Johnson v. Avery, 393 U.S. 483 (1969). In so doing this Court held that the access right is more than a "shield" against

restrictive practices that interrupt the flow of legal communications between inmates and the courts. The "more" that the access right guarantees is legal assistance.

Clarification of the legal assistance required to implement the access right began in Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970); aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam). This Court held that the access right is not satisfied merely because the state refrains from interfering with "jailhouse lawyers." Instead the access right mandates that states provide legal assistance to indigent inmates.

> Access to the courts . . . encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him. In some contexts this . . . require[s] court-appointed counsel for indigents [or] . . . free transcripts, process-serving facilities and in forma

> pauperis filing privileges. [emphasis added]

Gilmore, 319 F. Supp. at 110.

Bounds v. Smith, 430 U.S. 817 (1977), addressed the access right in terms of the extent and type of affirmative assistance a state must provide prisoners where the state might chose not to provide an adequate law library as required by Gilmore. This Court held that:

> [T]he fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law.

Id. at 828.

The North Carolina statute in question in Bounds authorized appointment of counsel in some state post-conviction proceedings for prison inmates whose claims survived initial review by the Court. Because post-filing legal

assistance was already available to North Carolina inmates, the real concern in Bounds became availability of legal assistance or an adequate law library in preparation and filing of actions by inmates. This Court reasoned that the access right creates an affirmative obligation to develop positive, "remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful." Id. at 822.

Bounds envisioned assistance beyond the initial pleading stage:

> Moreover, if the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoritative citations. Without a law library, an inmate will be unable to rebut the State's argument. . . . Even the most dedicated trial judges are bound to over look meritorious cases without the benefit of an adversary presentation.

Id. at 826.

This reasoning is followed in other opinions of this and other courts.

Gilmore v. Lynch, 319 F.Supp. 105 (N.D. Cal. 1970); aff'd sub nom. Younger v. Gilmore, 404 U.S. 15 (1971) (per curiam) held that a state must provide all the means a petitioner might require to get a fair hearing from the judiciary on all grievances alleged by him. Id. at 110. A "fair hearing" means a presentation to the court beyond just filing a complaint. Opinions from the Courts of Appeals for the Eleventh Circuit and the Fifth Circuit have concluded that Bounds requires assistance to prison inmates beyond the filing of initial pleadings. Bonner v. City of Prichard, 661 F.2d 1206, 1212-1213 (11th Cir. 1981); Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985).

Bounds suggested that a state may provide legal services to prison inmates as a substitute for a law library.

Justice Marshall observed that such legal services programs are the preferred means of implementing the access right for inmates because such plans

> not only result in more efficient and skillful handling of prisoner cases, but also avoid the disciplinary problems associated with writ writers. [citations omitted].

Id. at 830-831.

The opinion cautions that, "Any plan, however, must be evaluated as a whole to ascertain its compliance with constitutional standards." Id. at 832. "'Meaningful access' is the touchstone." Id. at 823.

Where a state chooses to provide legal services as a substitute for a law library, Bounds dictates that the constitutional adequacy of the State's efforts to furnish legal assistance to inmates must be measured in terms of the access inmates are actually afforded. Such

access must be "adequate, effective and meaningful." Bounds v. Smith, 430 U.S. at 822 (1977); Wilson v. Zarhadnick, 406 F. Supp. 1195 (M.D. Ga. 1975), rev'd on other grounds, 534 F.2d 55 (5th Cir. 1976).

The holding in Bounds refers to the "preparation and filing of meaningful legal papers." Bounds, 430 U.S. at 828. The Court of Appeals opinion herein holds that the term "meaningful legal papers" is limited to initial pleadings. However, memoranda in response to the states' motions to dismiss in §1983 actions or in response to the traverses of habeas corpus petitions are "meaningful legal papers." Memoranda are more crucial to a "fair hearing" than the initial complaint. Bonner v. Prichard City, 661 F.2d 1206 (11th Cir. 1981); Morrow v. Harwell, 768 F.2d 619 (5th Cir. 1985).

The Utah State Prison concedes it has no adequate law library. As an alternative to a law library, respondents contract to provide limited legal services to Utah inmates in the preparation of initial pro se complaints and nothing more. No actual representation by counsel is provided; assistance ends after the complaint or answer is filed. This limited assistance is NOT an adequate library substitute.

The importance of a full presentation of both sides of a legal claim in our adversary system cannot be over-stated; it underlies our legal system and is one of the bases for the decision in Bounds. To guarantee "meaningful access" and to assure an "adversary presentation", the inmate must effectively respond to post complaint matters.

The library alternative at the Utah State Prison creates a gross perversion of the adversary system rather than accomplishing the remedial effect required by Bounds. Under the Utah alternative, the non-law trained inmate is lead into the Roman Colosseum, the court, with the first weapon of the battle, a complaint, believing he can do battle and present his case. The opposition appears as a trained warrior, an Assistant Attorney General, with all the weapons of a legal battle at his disposal. This professional fighter has seconds to assist him in the battle; he has an arsenal in his law library. The gladiator strikes a responsive blow, a Motion to Dismiss. The unarmed inmate cannot fight back; the court has declined to appoint a second, a champion or a professional advocate to help fight his

case. The fight is quickly over with foreseeable results.

The inmates feels "set-up." Under the Utah alternative the inmate cannot begin to respond to the lethal motion. The inmate would be better off to have not filed the complaint until his release from prison. The the access right, and the concepts of a "fair hearing", and a "day in court" are mocked by such unfair treatment. If Utah provided the inmate with a law library, that would be his arsenal. He could search for the shield or the sword with which to respond. He would have the means to prepare memoranda necessary for a meaningful presentation of his claim.

The holding by the Court of Appeals in the case at bar was:

> [I]n light of the substantial effort already made by the State and the extent of the burden in requiring more, we are persuaded that we should

> not hold that the right of access to the courts requires more than the assistance of counsel through completion of the complaint for a federal habeas or civil rights action. Ward v. Kort, supra, slip op. at 11.

(A. pp. 18-19)

Ward v. Kort, 762 F.2d 856 (10th Cir. 1985) was decided as a companion case with the decision herein and involved the provision of legal assistance to patients at the Colorado State Mental Hospital. That hospital provided no law library and very limited assistance from contracting legal counsel; that limited assistance did not include drafting of initial complaints for patients. The Court of Appeals found a constitutional defect in the Colorado State Hospital arrangement and required additional services beyond the contract. The Court required "assistance of counsel through the completion of a federal habeas or civil rights complaint, including

necessary research and consideration of the facts and the law." Id., 860. The Court of Appeals reasoned that these services in conjunction with 28 U.S.C. §1915(d), discretionary appointment of counsel to indigents, would "follow the Supreme Court's teaching that "'[m]eaningful access' to the courts is the touchstone." Bounds, 430 U.S. at 823, 97 S.Ct. at 1495." Ward v. Kort, 762 F.2d 856, 861 (10th Cir. 1985).

A reading of Bounds that limits its directive to assistance only to initial pleadings is too narrow. Bounds stated its "main" concern was the preparation and filing of initial pleadings (430 U.S. at 828 n. 17). That comment was made in reference to a North Carolina statute providing for appointed counsel in certain cases at the hearing stage, but which neglected the initial pleading stage.

That "main" concern cannot fairly be read to limit or restrict the holding. The use of the word "main" implies the existence of other concerns which influenced the Court.

Bounds refers to the right of an indigent to a transcript for effective appellate review, and the right to counsel to assure a meaningful appeal. Bounds, 430 U.S. at 822; Gilmore, 319 F.Supp. at 110. This discussion of the importance of aid at the later stages is placed in the main body of the Bounds opinion. Bounds, 430 U.S. at 826. The Bounds holding does not restrict its decision to initial pleadings; it refers to the "preparation and filing of meaningful legal papers." Id. at 828.

The Court of Appeals below erred in its interpretation and application of

Bounds in the case at bar. The interpretation of Bounds as made by the Court in Bonner and in Morrow is appropriate and will accomplish the remedial relief dictated in Bounds. This Petition for a Writ of Certorari should be granted and this Court should clarify the intent of Bounds.

C. 28 U.S.C. §1915 (d) is Not A Substitute for a Law Library As Required by Bounds

Contrary to the suggestion of the Court of Appeals in the companion decision of Ward v. Kort, 762 F.2d 856, 861 (10th Cir. 1985) assistance only through filing of initial pleadings in conjunction with discretionary appointment of counsel by the Court under 28 U.S.C. §1915(d) is not an adequate substitute for a prison law library. Petitioners in this case each

asked the court for appointment of counsel and each was routinely denied appointment.

Provisions for appointment under 28 U.S.C. §1915(d) were in effect prior to the decision in Bounds; if that section were the solution to inmate court access, this Court need not have ruled as it did in Bounds.

Trial courts do not have the resources to routinely examine all pro se complaints filed by prison inmates under 42 U.S.C. §1983. Bonner v. City of Prichard, 661 F.2d 1206, 1208 n.2 & 1213 n.11. The case law requires examination of various factors to determine whether counsel should be appointed. McCarthy v. Weinberg, 753 F.2d 836, 838 (10th Cir. 1985); Ulmer v. Chancellor, 691 F.2d 209 (5th Cir. 1982); Merritt v. Faulkner, 697 F.2d 761 (7th Cir. 1983). Those factors are usually not apparent from a simple

review of a complaint. To review those factors either the court or the pro se plaintiff must engage in a factual presentation.

If the pro se plaintiff is able to developed and presented the necessary facts to the Court he will not qualify for appointment of counsel under 28 U.S.C. §1915(d). It is the classic predicament made famous in Joseph Heller's novel Catch-22. If an inmate can prove the factors requiring appointment of counsel, the inmate is capable enough that counsel need not be appointed. Or, in order to determine whether appointment of counsel is appropriate the court must appoint counsel to develop and present the necessary facts.

Case law dictates that appointments under §1915(d) "should be carefully limited," Merritt, 697 F.2d at 769, to

cases involving "exceptional circumstances," Ulmer, 691 F.2d at 212. A decision not to appoint counsel under §1915(b) will be reversed "[o]nly in those extreme cases where the lack of counsel results in fundamental unfairness. . ." McCarthy, 753 F.2d at 839. A provision of such limited applicability is not the remedy envisioned in Bounds.

The provision of a law library for use by Utah inmates beyond initial pleadings in compliance with Bounds would ease the burden of the federal courts in Utah, and prevent the need to consider appointment under 28 U.S.C. §1915(d) in every pro se action filed under 42 U.S.C. §1983.

Limited legal assistance plus the possibility of appointment of counsel under §1915(d) is not an adequate substitute for a law library as required by Bounds.

## CONCLUSION

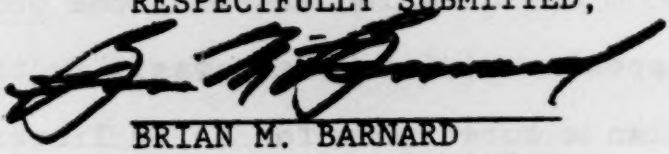
Bounds requires that prison officials provide a law library or an adequate substitute. The Utah alternative does not provide an adequate substitute; it provides the means of "access" only until a complaint is filed which is merely a token step toward meaningful access; it is akin to giving the inmate one-time access to a library. To so limit "meaningful access" mocks our adversary system and allows and encourages the superficial presentation of prisoner claims, the evil sought to to be prevented by the relief granted in Bounds. With a law library, an inmate could

represent himself after the initial pleadings. He could prepare an effective reply to a state defendant's motion to dismiss, an essential element of meaningful presentation of a claim. But the Utah alternative is useless to an inmate once he is in court.

The question asked by the Court of Appeals opinion herein was, "Is the Utah plan a substitute for a law library in the filing of initial pleadings?" That is not the question that must be addressed under Bounds. The Utah plan must be examined asking, "Is it equivalent to a law library available for use throughout litigation?" The answer to that inquiry is in the negative. The reasoning of Bonner and Morrow should prevail. A reversal of the Court of Appeals decision herein is required under Bounds and Younger.

For the reasons stated herein, the Petitioners, STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER, request this Court to grant the Petition for a Writ of Certiorari to resolve the conflict between the Circuits and clarify the issues raised herein.

RESPECTFULLY SUBMITTED,



BRIAN M. BARNARD
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214 East Fifth South
Salt Lake City,
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DATED: SEPTEMBER 17, 1985.

# APPENDIX

## Decision of the United States Court of Appeals

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

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| | | |
|---|---|---|
| STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER, Plaintiffs-Appellants | : | |
| vs | : | |
| WILLIAM MILLIKEN, et al, Defendants-Appellees. | : | Case No. 82-1668 |

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH, CENTRAL DIVISION (D.C. NO. 80-0619-W)

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Brian M. Barnard, Salt Lake City, Utah (John W. Porter, Salt Lake City, Utah was also on the brief) for Plaintiffs-Appellants

Douglas C. Richards, Assistant Attorney General, Salt Lake City, Utah (David L. Wilkinson, Attorney General, Salt Lake City, Utah, was also on the brief) for Defendants-Appellees

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Before HOLLOWAY, Chief Judge, BARRETT, Circuit Judge, and BOHANON, District Judge*

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HOLLOWAY, Chief Judge

In this civil rights action plaintiffs, indigent Utah prison inmates, allege that during their incarceration they were denied their right to meaningful access to the courts in violation of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. Summary judgment was entered in favor of defendants and plaintiffs appeal. We affirm.

I.

Plaintiffs are involved in legal actions which they are attempting to prosecute or defend pro se. Specifically

* The Honorable Luther L. Bohanon, United States District Judge of the Eastern, North and Western Districts of Oklahoma, sitting by designation.

plaintiff Nordgren claims that he is the defendant in a paternity suit and that he is the plaintiff in a federal civil rights action brought against the Salt Lake County Jail and the County Sheriff which was dismissed, appealed, remanded and is pending in the United States District Court for the District of Utah.

Plaintiff Yoakam alleges that he is seeking to modify his divorce decree and that he has filed an action against Salt Lake County and various officers thereof for conversion of his guns. Plaintiff Dodge claims that he has several cases pending in the United States District Court in the nature of civil rights actions against the staff of the Utah State Prison as a result of due process and/or cruel and unusual punishment violations. Plaintiff Bolsinger claims that he has several actions pending in the

United States District Court in the nature of civil rights actions against the staff of the Salt Lake County jail and other county officials as a result of the treatment he received while incarcerated in the County Jail. I R 156-64.

Plaintiffs say that they petitioned the trial courts on various occasions to appoint legal counsel to represent them beyond the initial stages and these courts refused to do so. Id. at 157[1]. Plaintiffs also say that two legal aid organizations in Salt Lake County will not assist them, id. at 173, and that defendants have refused to provide a law

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1 In Nordgren v. Mitchell, 716 F.2d 1335, 1339-40 (10th Cir. 1983), we held that neither due process nor equal protection requires Utah to appoint counsel for all indigent prisoners who are defendants in paternity cases.

library or provide legal assistance beyond assisting plaintiffs in filing the initial pro se pleadings. Id. at 157.

The United States magistrate in his report and recommendation on the parties' motions for summary judgment found that "[t]he State of Utah has elected to provide at the prison minimal law library facilities and services of contract attorneys to assist inmates in preparing pleadings to initiate court actions and proceedings."[2] Id. at 233. The

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2 The magistrate cited the following provisions of the contract between the State Division of Corrections and the contracting firm as being pertinent:

> "Whereas, the DIVISION . . . recognizes the need to provide additional legal assistance to prisoners of the Utah State Prison in the preparation and filing of initial legal documents in any civil matters (state or federal) other than those handled by the Salt Lake Legal Defender Association, including but

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magistrate also found that "[t]here is no constitutional requirement that the assistance of lawyers be provided to the

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(Fn. continued):
not limited to civil rights actions, divorce, child custody, guardianship, and tort liability actions . . .

. . .

"(4) LAW FIRM agrees to provide attorneys who shall provide legal advice, consultation, and assistance to inmates regarding the preparation and filing of initial pleadings in those civil actions referred to above. In cases determined to be meritorious and founded in law, attorneys provided by LAW FIRM shall have discretion in determining which cases are appropriate for court-appointed counsel, and in those cases shall prepare and file motions to the court for court appointed counsel and motions to proceed in forma pauperis. In cases not appropriate for court appointed counsel or where the inmate is not indigent, or where the court declines to appoint counsel, he/she shall be referred to private counsel. Attorneys provided by LAW FIRM shall make good faith efforts to attempt to secure counsel, through court appointment, private counsel, or legal aid agencies, to pursue legal

(Fn. cont'd to next page)

plaintiffs by the defendant in the defense or prosecution of civil actions beyond the pleading stage." Id. at 239. This report

(Fn. continued)

> matters after the initial pleadings. In the performance of all obligations under this contract, attorneys provided by LAW FIRM shall conform to the requirements imposed on them by the applicable law of the State of Utah and the Code of Professional Responsibility.
>
> . . .
>
> "Nothing herein shall preclude attorneys provided by LAW FIRM in their discretion from representing inmates at later stages of the proceedings in those civil actions filed; however, monies appropriated by the DIVISION under this contract are strictly for purposes of initial consultation, preparation and filing of initial pleadings and are not to be expended by LAW FIRM for providing attorneys to furnish legal assistance to inmates at later stages of any legal proceedings. Attorneys provided by LAW FIRM shall not be obligated to represent inmates at later stages of the process in those civil actions filed."

I R. 234.

The Utah State Department of Social

(Fn. cont'd to next page)

of the magistrate was accepted and defendants' motion for summary judgment was granted by the district judge. Id. at 245-48.

II

Plaintiffs argue on appeal that defendants have refused to maintain an adequate and complete law library at the Utah State Prison so that they can

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(Fn. continued):
Services, Division of Corrections, and the Salt Lake Legal Defenders Association entered into a contract whereby the Salt Lake Legal Defender Association agreed to provide "legal assistance to prisoners (1) in preparation, filing and representing persons on writs of habeas corpus in the Third Judicial District Court and in appeals in the Utah Supreme Court, and (2) in the preparation and filing of petitions for writs of habeas corpus in the United States District Court, District of Utah, Central Division, and (3) in advising them of any rights and appropriate procedures to perfect any appeals of their criminal convictions in the Utah Supreme Court." Id. at 226-27. These contracts were in force for the years 1981 and 1982 and similar contracts were in force for the year 1980. Id. at 217.

properly represent themselves and that there is no adequate alternative to a law library to provide Utah prison inmates with meaningful access to the courts. Plaintiffs say that meaningful access to the courts entails legal assistance at all stages of judicial proceedings at the trial level, not just the initial pleading stage; that legal assistance must be available to prison inmates for all types of civil cases; and that legal assistance must be provided to inmates regardless of whether their claims are deemed meritorious by prison officials.

Defendants say that they do not claim to have an adequate law library at the prison. Brief of Appellees 3. They contend, however, that there is an adequate alternative to a law library which provides inmates at the Utah State Prison with meaningful access to the courts.

They say that the obligation of the State to provide meaningful access to the courts is satisfied through the services of contract attorneys; that there is no constitutional requirement that the assistance of attorneys be provided to inmates in the defense or prosecution of civil actions beyond the initial pleading stage; and that what is "meaningful" access to the courts must be considered in light of "reasonableness" in the prison setting, giving deference to prison administrators' discretion.

"The right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution." Ryland v. Shapiro, 708 F.2d 967, 971 (5th Cir. 1983). Referring to Chambers v. Baltimore & Ohio Railroad Co., 207 U.S. 142 (1907), the Ryland court

stated that the Supreme Court "viewed the right of access to the courts as one of the privileges and immunities accorded citizens under article 4 of the Constitution and the fourteenth amendment." Ryland, 708 F.2d at 971. The Court found "in the first amendment a second constitutional basis for this right of access: 'Certainly the right to petition extends to all departments of Government. The right of access to the courts is indeed but one aspect of the right of petition.'" Id. (citing California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 510 (1972)). "A third constitutional basis for the right of access to the courts is found in the due process clause." Id. at 972. In Wolff v. McDonnell, 418 U.S. 539, 579 (1974), the Supreme Court stated that "[t]he right of access to the courts, upon which Avery

[Johnson v. Avery, 393 U.S. 483 (1969)] was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[3]

Access to the courts "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." Gilmore v. Lynch, 319 F.Supp. 105, 110 (N.D. Cal. 1970), aff'd sub nom, Younger

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3 We note that plaintiffs also allege a denial of their right to meaningful access to the courts in violation of the Equal Protection Clause of the Fourteenth Amendment. We find no reasoning or authority presented by plaintiffs to support this theory.

v. Gilmore, 404 U.S. 15 (1971) (per curiam). That a state prison inmate has a right of access to the courts was first enunciated in Ex parte Hull, 312 U.S. 546 (1941). Annot., 23 A.L.R. Fed. 1, 14 (1975). There the Supreme Court stated that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus." Ex parte Hull, 312 U.S. 546, 549 (1941). In Johnson v. Avery, 393 U.S. 483, 490 (1969), the Court held that "unless and until the State provides some reasonable alternative to assist inmates in the preparation of petitions for post-conviction relief, it may not validly enforce a regulation . . . barring inmates from furnishing such assistance to other prisoners." (footnote omitted). And in Wolff, 418 U.S. at 579, the Court stated that "the demarcation line between civil

rights actions and habeas petitions is not always clear. The Court has already recognized instances where the same constitutional rights might be redressed under either form of relief."

In Bounds v. Smith, 430 U.S. 817, 828 (1977), the Supreme Court defined the duty of the States to protect the right of prisoners to access to the courts by holding that "the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from person trained in the law." (footnote omitted). See Ward v. Kort, ___ F.2d ___, No. 82-1418 (10th Cir. 1985), filed today. Because defendants do not claim that they have an adequate law library at the prison, Brief

of Appellees 3, we must determine whether the State of Utah provides prison inmates with adequate assistance from persons trained in the law. Ward v. Kort, supra.

Plaintiffs contend that meaningful access to the courts entails legal assistance at all stages of judicial proceedings at the trial level, not just the initial pleading stage. Defendants deny that there is any constitutional requirement of such extensive assistance by attorneys. In Wolff, 418 U.S. at 576, the Supreme Court stated that "the Fourteenth Amendment due process claim based on access to the courts, Ex parte Hull, 312 U.S. 546 (1941); Johnson v. Avery, 393 U.S. 483 (1969); Younger v. Gilmore, 404 U.S. 15 (1971), has not been extended by this Court to apply further than protecting the ability of an inmate to prepare a petition or complaint." In Bounds, 430

U.S. at 828, the Court held that the "right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers. . . ." (emphasis added). And the Court stated that ". . . our main concern here is 'protecting the ability of an inmate to prepare a petition or complaint,' Wolff v. McDonnell, 418 U.S., at 576. . . ." Id. at 828 n. 17; Ward v. Kort, supra, slip op. at 7.

Most courts have not interpreted Bounds as extending the right of access to the courts so as to require special assistance to inmates further than the initial pleading stage. See Connecticut Bd. of Pardons v. Dumschat, 452 U.S. 458, 471 n. 4 (1981) (Stevens, J., dissenting, and citing Bounds, stated that the Constitution has been applied to issues affecting prisoners including "right to

assistance in the filing of legal papers."); Branch v. Cole, 686 F.2d 264, 266 n. 1 (5th Cir. 1982) (per curiam) (the explicit concern of Bounds "was getting inmates through the courtroom door."); Ramos v. Lamm, 639 F.2d 559, 584 n.29 (10th Cir. 1980) (in considering whether alternative to law library was adequate, court found evidence failed to show that inmate library clerks were capable of helping any inmate draft a legal document, cert. denied, 450 U.S. 1041 (1981); Cruz v. Hauck, 627 F.2d 710, 721 n.22 (5th Cir. 1980)("[I]nmates are entitled to either access to legal materials or access to counsel for assistance in filing habeas corpus and civil rights actions. 430 U.S. at 825-29."); Cf. Carter v. Kamka, 515 F. Supp. 825, 831 (D. Md. 1980)(Legal Assistance Program met "the 'adequacy' requirement, not only in 'the preparation and

filing of meaningful legal papers', as required by Bounds, but in the entire gamut of representing D O C inmates in civil rights cases, and habeas corpus cases as well."). But see Bonner v. City of Prichard, Ala., 661 F.2d 1206, 1212 (11th Cir. 1981) (en banc) (Inmate access to the courts is not "adequate, effective and meaningful" if "it embraces no more than being permitted to file a paper that, without determination of whether it states a claim legally sufficient and within the court's jurisdiction, is subject to dismissal on grounds of convenience to court and litigants.").

We are mindful of the significant claim involved here and its central importance in the protection of all rights of prisoners. Nevertheless in light of the substantial effort already made by the State and the extent of the burden in

requiring more, we are persuaded that we should not hold that the right of access to the courts requires more than the assistance of counsel through completion of the complaint for a federal habeas or civil rights action. Ward v. Kort, supra, slip op. at 11.

III

Plaintiffs also argue that legal assistance must be provided inmates without regard to a determination by prison officials that their claims are meritorious. Plaintiffs say that under defendants' plan no assistance need be given to an inmate on motions to proceed in forma pauperis or motions to appoint counsel where the contracting law firm determines the inmate's case to be unmeritorious. Brief of Appellant 23. Defendants argue that the law firm only has discretion in determining which cases are

appropriate for court-appointed counsel and that they will apply for appointment of counsel for inmates when appropriate. They maintain that there is no discretion involved in the preparation of initial pleadings; if the inmate wants to file a complaint, the law firm is bound to help draft the complaint. Brief of Appellees 11.

In Ex parte Hull, 312 U.S. at 549, the Supreme Court held that a regulation is invalid that imposes a screening process between an inmate and the court. The Court stated that "the state and its officers may not abridge or impair petitioner's right to apply to a federal court for a writ of habeas corpus. Whether a petition for writ of habeas corpus addressed to a federal court is properly drawn and what allegations it must contain are questions for that court alone to

determine." Id. We find that procedures followed by the law firm determine only which cases are appropriate for court-appointed counsel and which should be referred to private counsel. See note 2, supra. These procedures do not violate the principles laid down by the Supreme Court and do not infringe the right of access to the courts.[4]

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4

Plaintiff also contend that a law library or legal assistance must be available to prison inmates for all types of civil cases. Brief of Appellants 21. The argument seems to have no factual basis because in the contract with the Utah State Department of Social Services, Division of Corrections, the law firm agreed to provide "legal advice, consultation and assistance to inmates regarding the preparation and filing of initial pleadings" "in any civil matters (state or federal) other than those handled by the Salt Lake Legal Defender Association, including but not limited to civil rights

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IV

Accordingly, we conclude that plaintiffs have not shown any constitutional infirmity in the procedures used by the State of Utah amounting to a denial of access to the courts. The agreements with the law firm and the legal defender association, see note 2, supra, protect the inmates' basis right of access to the courts in connection with both federal habeas and civil rights cases, which is of primary concern. See Ward v. Kort, supra, slip op. at 11.

A F F I R M E D.

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(Footnote continued):
actions, divorce, child custody, guardianship, and tort liability actions." I R. 220-221.

In Ward v. Kort, supra, slip op. at 11, we hold that where the State elects to have contract attorneys as an alternative to an adequate law library, plaintiff is entitled to assistance of counsel through the completion of a federal habeas or civil rights complaint, including necessary research and consideration of the facts and the law.

Decision of the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

---

STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER,

Plaintiffs,

-vs-

WILLIAM MILLIKEN, individually and as Director of the Utah Division of Corrections, S. L. DIBELL, BARBARA R. BURNETT, REV. FRANCE A. DAVIS, DR. JEAN B. WHITE, DR. BART WOLTHUIS, M. H. FLORES, individually and as members of the Board of Corrections of Utah, LARRY MORRIS, individually and as Warden of the Utah State Prison, and STATE OF UTAH,

Defendants

ORDER AND MEMORANDUM DECISION

Civil No: C-80-0619

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An Order and Memorandum Decision was intended to be signed and filed in the above captioned case on May 12, 1982, but

said Order was erroneously and inadvertently captioned with the heading of Steven Nordgren, et al v. Anthony W. Mitchell, et al, Case No. C-80-0557, another case filed in the above entitled court. The May 12, 1982 Order in that case is therefore stricken and this shall be the Order and Memorandum Decision entered in this case.

Both the plaintiffs and the defendant moved for summary judgment on agreed or undisputed material facts. This motion was heard by the Magistrate who issued his Report and Recommendation dated March 15, 1982. He recommended that defendants' motion for summary judgment be granted. Copies of that report were mailed to the parties' attorneys and plaintiffs made timely objection thereto and requested oral argument on their objections before this court. Argument was heard on May 11,

1982. Plaintiffs were represented by Brain M. Barnard and defendant by Douglas C. Richards. Prior to the hearing, the court had made a de novo review of the memoranda, affidavits, and all other materials in the file which are pertinent to the parties' cross-motions for summary judgment. Since the oral argument, the court has further considered the matter and being now fully advised,

IT IS HEREBY ORDERED that plaintiffs' objections to the Magistrate's Report and Recommendation are overruled and the court hereby accepts said Report and Recommendation including that the defendants' motion for summary judgment be granted.

Defendants' attorney is to prepare an appropriate summary judgment in accordance with this order.

Dated this 14th day of May, 1982.

/S/
DAVID K. WINDER
United States
District Judge

Mailed a copy of the foregoing Amended Order and Memorandum Decision to the following named counsel the 14th day of May, 1982.

Brian M. Barnard, Esq.
214 East Fifth South
Salt Lake City, Utah 84111

Douglas C. Richards
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

/S/
Secretary

Report and Recommendation of the United States Magistrate for the United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
CENTRAL DIVISION

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|---|---|---|
| STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE and JOHN C. BOLSINGER, | ) | |
| Plaintiffs, | ) | Case No. C-80-0619W |
| vs. | ) | |
| WILLIAM MILLIKEN, et at., | ) | REPORT AND RECOMMENDATION |
| Defendants, | ) | |

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The issue in this civil rights action filed by Utah Prison inmates against prison administrators is whether the plaintiffs are provided adequate access to the courts during their incarceration at the prison. Both the plaintiffs and the defendants have moved for summary judgment on agreed or undisputed material facts.

FACTS

It is argued by the defendants [sic - plaintiffs?] that the law library facilities at the prison are inadequate to permit meaningful preparation by inmates for trial of law suits or complaints and petitions to the courts.

The State of Utah has elected to provide at the prison minimal law library facilities and services of contract attorneys to assist inmates in preparing pleadings to initiate court actions and proceedings. Pertinent provisions of the contract between the State Division of Corrections and the contracting law firm are:

> "Whereas, the DIVISION . . . recognizes the need to provide additional legal assistance to prisoners of the Utah State Prison in the preparation and filing of initial legal documents in any civil matters (state or federal) other that those handled by the Salt Lake Legal Defenders Association, including but not limited to civil rights actions,

divorce, child custody, guardianship, and tort liability actions . . .

. . .

"(4) LAW FIRM agrees to provide attorneys who shall provide legal advice, consultation, and assistance to inmates regarding the preparation and filing of initial pleadings in those civil actions referred to above. In cases determined to be meritorious and founded in law, attorneys provided by LAW FIRM shall have discretion in determining which cases are appropriate for court-appointed counsel, and in those cases shall prepare and file motions to the court for court-appointed counsel and motions to proceed in forma pauperis. In cases not appropriate for court appointed counsel or where the inmate is not indigent, or where the court declines to appoint counsel, he/she shall be referred to private counsel. Attorneys provided by LAW FIRM shall make good faith efforts to attempt to secure counsel, through court appointment, private counsel, or legal aid agencies, to pursue legal matters after the initial pleadings. In the performance of all obligations under this contract, attorneys provided by LAW FIRM shall conform to the requirements imposed on them by the applicable laws of the State of Utah and the Code of Professional Responsibility.

. . .

> "Nothing herein shall preclude attorneys provided by LAW FIRM in their discretion from representing inmates at later stages of the proceedings in those civil actions filed; however, monies appropriated by the DIVISION under this contract are strictly for purposes on initial consultation, preparation and filing of initial pleadings and are not to be expended by LAW FIRM for providing attorneys to furnish legal assistance to inmates at later stages of any legal proceedings. Attorneys provided by LAW FIRM shall not be obligated to represent inmates at later stages of the process in those civil action filed."

The plaintiff Nordgren has alleged in the joint complaint that he is a defendant in a state paternity action. He cannot afford legal counsel to represent him in that action; none of the legal service agencies will assist him; the prison contract attorneys have provided limited assistance but will not represent him at the trial, and without adequate law library facilities at the prison he cannot properly prepare a defense to the action. In addition, a civil rights action filed

by him in this court was improperly dismissed as frivolous in part because lack of access to a law library prevented him from properly pleading his claim.

The plaintiff Yoakam has pending in a state court a petition to modify a divorce decree. The state court has refused to appoint counsel for him in that action; the prison contract attorneys will not assist him, and he cannot himself adequately prosecute that petition without proper law library facilities.

The plaintiffs Dodge and Bolsinger have alleged that they have several civil rights action pending in this court that cannot be properly processed by them pro se without access to a law library at the prison.

The records of this court disclose that in fact a pro se civil rights action filed by the plaintiff Nordgren was

improvidently dismissed upon a recommendation of the magistrate; there was a reversal of the dismissal, and the case was settled upon the payment to him by Salt Lake County of $100. The plaintiff Dodge has one case pending in this court (Case No. C-80-0444W) involving claimed constitutional violations by prison administrators in the operation of the prison maximum security section. Processing of that case has been delayed because of difficulty in acquiring the pertinent facts. Legal counsel has been secured to assist him in prosecuting that action. He has filed other pro se complaints in this court that have been dismissed pursuant to 28 U.S.C. 1915(d). Mr. Bolsinger has two actions pending in this court against county jail administrators. One involving claimed overcrowding at the jail has been consolidated with several similar cases

and is on the trial calendar. Counsel has been secured to represent all plaintiffs in those consolidated actions. A second case involves claimed improper opening of official mail by jail officers and denial of access to current magazines and periodicals. That case is awaiting trial, and legal counsel had not been secured for the plaintiff.

Not only are the prison law library facilities inadequate, but there is not trained librarian to assist inmates in making use of the limited law books that are available.

DISCUSSION

In Kelbach v. Milliken, Case No. C-75-91, this court entered the following order, inter alia, defining the obligation of the Utah State Prison officials in this area following a finding that the prison law library facilities were inadequate to

comply with the court access requirements of Bounds v. Smith, 430 U.S. 817 (1977):

> "The Defendants shall provide legal assistance to prisoners only for purposes of consultation, initial preparation and filing of legal documents, and nothing herein shall require the Defendants to provide legal assistance to prisoners at later stages of any legal proceedings."

That guideline has been used by the State of Utah and relied upon by it as the measure of its constitutional obligation. However, the Kelback decision was entered pursuant to a stipulated settlement. It is not accepted in this report and recommendation as controlling authority.

In Nordgren, et al., v. Mitchell, et al., Case No. C-80-0557, this court determined that indigent prisoners had no Constitutional Fifth Amendment right to appointment of legal counsel to assist them in defending state paternity actions. An appeal is pending in that case. The

defendants place substantial reliance upon the decision in that case. It is true that in its decision the court stated:

> "The court so holds with full knowledge of the particular circumstances presented in this case. Plaintiffs' counsel has fully briefed the court regarding the inadequate legal facilities available to inmates at the Utah State Prison, and regarding the possible denial of access to the courts which such a situation may present. Plaintiffs are not, however, seeking an order requiring a more adequate library at the prison, but seek to have this court order counsel appointed in lieu thereof. This goes far beyond the requirements established in Bounds v. Smith, 430 U.S. 817 (1977). Indeed, the State appears to have complied with the Bounds requirements by providing legal assistance in the preparation and filing of initial pleadings, and such assistance would presumably meet also the requirements of the Utah Constitution's 'open courts' clause."

That statement by the court was not determinative basis of its decision, and that decision is not considered to be or persuasive help in the resolution of this prison library issue.

This issue must be resolved under the mandate of Bounds v. Smith, supra. In Bounds the court stated:

> "We hold, therefore, that the fundamental constitutional rights of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."

In its footnote 17 following that statement the court stated its main concern was "protecting the ability of an inmate to prepare a petition or complaint." It also stated, however:

> "Indeed, despite the 'less stringent standards' by which a pro se pleading is judged Haines v. Kerner, 404 U.S. 519, 520 (1972), it is often more important that a prisoner complaint set forth a nonfrivolous claim meeting all procedural prerequisites, since that Court may pass on the complaint's sufficiency before allowing filing in forma pauperis and may dismiss that case if it is deemed frivolous. See 28 U.S.C. §1915. Moreover, if the State files a response to a pro se pleading, it will undoubtedly contain seemingly authoratative citations.

> Without a library, an inmate will be unable to rebut the State's argument. It is not enough to answer that the court will evaluate the facts pleaded in light of the relevant law. Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation."

The issue is whether the court in Bounds intended that states be required either to provide a fully equipped law library or in the alternative to provide services of a lawyer not just in consulting the inmates and preparation of initial pleadings but in the preparation for trial and the trial of all types of civil actions. The language of the court does not seem to impose so great an obligation. No cases have been found imposing such an obligation upon the states. The plaintiffs have presented no cases supporting the interpretation urged by them. Cases supporting a more narrow interpretation are found. In the

following cases the court in fixing the obligation of the state in providing meaningful access to the courts for its prisoners referred either to Note 17, supra, of Bounds or to the "filing of meaningful papers" language employed by the court. Rudolph v. Locke, 594 F.2d 1076 (5th Cir. 1979); Cruz v. Hauck, 627 F.2d 710 (5th Cir. 1980); Steinberg v. Taylor, 500 F. Supp. 477 (D. Conn. 1980); Green v. Ferrell, 500 F. Supp. 870 (S.D. Miss. 1980). In Johnson v. Brelje, 482 F. Supp. 125 (N.D. Ill. 1970), the court said: "The main concern of Bounds was the protection of the right of prison inmates to petition the court for relief."

None of these cases is helpful except only in showing that the courts have not interpreted Bounds as imposing upon the state the obligations sought to be imposed upon the State of Utah by these

plaintiffs. None of the cases involved the precise question here posed: How far the state must go in providing legal counsel assistance as an alternative to adequate law library facilities.

Justice Renquist in his dissent in Bounds expressed concern that a logical extension of the court's decision would be to compel the state to provide counsel to represent prisoners in collateral attacks on their convictions or to provide counsel in all prisoner cases. There has not yet been that extension. If it is to be made, it should be made by the Supreme Court and not by this court. See Twyman v. Crist, 584 F.2d 352 (10th Cir. 1978).

It is concluded by the magistrate that the obligation of the state in providing meaningful access to the courts is that stated in Kelback and quoted herein. The undisputed facts disclose

that the defendants are now complying with that standard. There is no constitutional requirement that the assistance of lawyers be provided to plaintiffs by the defendants in the defense or prosecution of civil actions beyond the pleading stage.

The plaintiffs have attacked the contract with the prison attorneys because it gives those attorneys discretion in determining meritorious actions and those actions that are appropriate for filing motion for appointment of counsel and motions for leave to proceed in forma pauperis. That type of screening was suggested in Bounds as an advantage to the use of lawyers in lieu of law libraries as a means of providing access to the courts. It is not an objectional provision of the contract. The approved forms employed by this court and made available to prisoners make it simple to apply to the court for

in forma pauperis filing, and the court will make that determination and also the determination whether and at what stage in the proceedings counsel might be secured for pro se litigants.

It is recommended that the defendants' motion for summary judgment be granted.

Copies of this report and recommendation are being served upon the parties. They are advised of their right to file objections hereto within 10 days from the date hereof.

DATED this 15th day of March, 1982.

/S/
DANIEL A. ALSUP
United States Magistrate

CERTIFICATE OF MAILING

I hereby certify that I mailed a copy of the foregoing report and recommendation to Brian M. Barnard, Esq., 214 East Fifth South, Salt Lake City, Utah 84111 and to Douglas C. Richards, Assistant Utah Attorney General, 236 State Capitol, Salt Lake City, Utah 84114, on the 15 day of March, 1982.

/S/
CLERK

## MAILING CERTIFICATE

I hereby certify that on the 17th day of September, 1985, I caused to be mailed two copies of the above and foregoing BRIEF IN SUPPORT OF PETITION FOR CERTORARI to:

Attorneys for Respondents-
Appellees-Defendants
BRENT BURNETT
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Attorneys General
236 State Capitol
Salt Lake City, UT 84114

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DAN MANVILLE, Esq.
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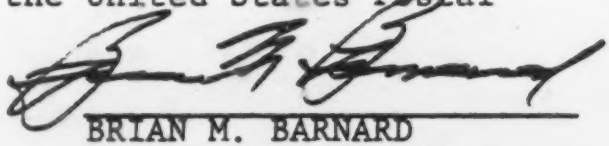
DAVID MILLER, Esq.
AMERICAN CIVIL LIBERTIES
UNION OF COLORADO
815 East 22nd Avenue
Denver, Colorado 80205

counsel for the opposing party, postage prepaid in the United States Postal Service.



BRIAN M. BARNARD
Attorney for Petitioners

Supreme Court, U.S.
FILED
NOV 25 1985
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-471

In The

# Supreme Court of the United States

October Term, 1985

STEVEN RICHARDS NORDGREN, DOUGLAS YOAKAM, RAY DODGE, and JOHN C. BOLSINGER,

*Petitioners,*

v.

WILLIAM MILLIKEN, Director, Utah Division of Corrections, S. L. DIBELL, BARBARA R. BURNETT, REV. FRANCE A. DAVIS, DR. JEAN B. WHITE, DR. BART WOLTHUIS, M. H. FLORES, members of the Board of Corrections of Utah, LARRY MORRIS, Warden of the Utah State Prison, and STATE OF UTAH,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED FOR REVIEW

Whether the court below properly refused to extend the effect of this Court's decision in *Bounds v. Smith,* to require the State of Utah to provide for the assistance of counsel beyond the completion and filing of a complaint.

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## TABLE OF AUTHORITIES

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## STATEMENT OF THE CASE

In an order, dated October 3, 1985, the United States Court of Appeals for the Tenth Circuit permitted the appellants' (petitioners') untimely petition for rehearing, with suggestion for rehearing en banc to be filed as of June 6, 1985.

In a further order, dated October 18, 1985, the United States Court of Appeals for the Tenth Circuit denied the appellants' (petitioners') petition for rehearing and suggestion for rehearing en banc.

———o———

## SUMMARY OF ARGUMENT

Certiorari review of this case is not warranted. No court of appeals "has rendered a decision in conflict with the decision of" the Tenth Circuit that assistance of counsel in the preparation and filing of a meaningful complaint satisfies the constitutional needs of the petitioners to meaningful access to the courts. Nor has the Tenth Circuit or the District Court of Utah "so far departed from the accepted and usual course of judicial proceedings" in this case, "as to call for an exercise of this Court's power of supervision." S.Ct. Rule 17.

Petitioners seek a Writ, claiming that the decision of the court below is in conflict with certain rulings of the United States Courts of Appeals for the Fifth and Eleventh Circuits. This is not the case. In fact, the United States Circuit Court of Appeals for the Tenth Circuit, in deciding

the instant matter, relied upon decisions from the Fifth Circuit. The cases cited by the petitioners are not on point and do not speak to the question at issue.

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## ARGUMENT

In *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206 (11th Cir. 1981), the Court did not address the question at issue in this matter. *Bonner* did not involve the quality or quantity of assistance that an inmate should receive in the preparation and filing of a complaint. In *Bonner,* the district court, on its own motion, dismissed the plaintiff-inmate's complaint without prejudice. This action was taken for the convenience of the court and in the belief that the plaintiff could refile after he had been released from custody if he so desired.

In reversing, the Eleventh Circuit held that the grounds for the dismissal were inadequate. In so doing, the court held that inmate access to the courts is not adequate, effective and meaningful under ***Bounds v. Smith,*** 430 U.S. 817 (1977) if a complaint that states a legally sufficient claim within the jurisdiction of the court is subject to dismissal on grounds of convenience to courts and litigants. 661 F.2d 1206, 1212. At no time did the court address the question of whether the defendant city should be required to provide the assistance of counsel beyond the filing of a meaningful complaint.

In *Morrow v. Harwell,* 768 F.2d 619 (5th Cir. 1985), the court held that the severely restricted access to legal

books provided by the McLennan County Jail did not provide the inmates of that jail meaningful access to court. The Fifth Circuit was not presented with the question of whether the defendant county jail should be required to provide the assistance of counsel beyond the filing of a meaningful complaint.

No decision by any of the United States Circuit Courts of Appeals is in conflict with the decision of the Tenth Circuit in this matter. In fact, the Tenth Circuit in deciding this action cited a decision of the United States Circuit Court of Appeals for the Fifth Circuit that reached the same result.

In *Cruz v. Hauck,* 627 F.2d 710 (5th Cir. 1980), the district court had held that it's appointment of counsel to assist inmates when it determined a hearing on the complaint was necessary satisfied the need for meaningful access to the courts. In rejecting this position, the Fifth Circuit held that this is not sufficient because the right to meaningful access to the courts means that "inmates are entitled to either access to legal materials or access to counsel for assistance in *filing* habeas corpus and civil rights actions." 627 F.2d 710, 721 n. 22.

The right of access to the courts set forth in *Bounds* should not be extended so as to require special assistance to inmates further than the initial pleading stage. If such assistance is needed in a particular case, the district court can appoint counsel to assist the indigent under 28 U.S.C. § 1915(d). *McCarthy v. Weinberg,* 753 F.2d 836 (10th Cir. 1985), *Merritt v. Faulkner,* 697 F.2d 761 (7th Cir. 1983) and *Ulmer v. Chancellor,* 691 F.2d 209 (5th Cir. 1982).

———o———

## CONCLUSION

For the foregoing reasons, a writ of certiorari should not issue to review the decision of the United States Circuit Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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